

ANDRES GARCIA)	
Claimant)	
VS.)	
)	
LEISURE HOTEL, d/b/a SUPER 8)	Docket No. 219,732
Respondent)	
AND)	
)	
ROYAL INSURANCE COMPANY OF AMERICA)	
Insurance Carrier)	

- (1) Did claimant provide respondent with timely notice of accident as required by K.S.A. 44-520?
- (2) Does K.S.A. 44-510f bar claimant's entitlement to temporary total disability compensation?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, for preliminary hearing purposes the Appeals Board finds as follows:

The preliminary hearing Order dated May 16, 1997, should be reversed and this proceeding remanded to the Administrative Law Judge to address the remaining issues pertaining to claimant's entitlement to benefits.

(1) Did claimant provide respondent with timely notice of accident as required by K.S.A. 44-520?

Claimant alleges he injured his back when working for the respondent on or about August 22, 1996, while he was lifting mattresses. At the time of the incident claimant felt a pain in his lower back. Believing the pain would resolve, claimant did not immediately seek medical treatment but, instead, continued to work for the respondent. Claimant testified he had previously experienced similar pain and it had resolved. Claimant has a history of back problems as he has undergone two previous surgeries, one of which was a spinal fusion performed in 1992. However, claimant's symptoms did not resolve and in September 1996 his symptoms worsened as he began to experience numbness in his groin. Once the numbness developed, claimant notified respondent's general manager, Connie Schreiber, of his alleged back injury.

Respondent and its insurance carrier contend claimant failed to provide timely notice of accident as required by K.S.A. 44-520. They contend claimant did not notify respondent of the accident until September 17, 1996, after claimant began to experience numbness in the groin.

Claimant, on the other hand, contends he told an immediate supervisor, Shawn Grove, about his back hurting on at least two different occasions both within a week of the lifting incident. In that regard, claimant testified as follows:

"A. Oh, probably about a week - - about a week afterwards, I was outside doing the yard or doing the lot, and Shawn was driving by, and I hollered at him to come over, and he came over and I said, 'Do you remember that I told you before that my back was hurting, but I didn't think anything about it?' He said, 'Yeah.' I said, 'Well, it hasn't got no better.' He said, 'Well, if it doesn't get any better by the end of the day tell Connie and we'll see what she wants to do about it.'"

Later, however, claimant testified during cross-examination he could not actually remember when during the period between August 22 and September 17 that he reported the incident to Mr. Grove. Respondent presented an affidavit from Mr. Grove in which he states claimant did not complain of a low back problem until September 17, 1996.

Based upon the evidentiary record compiled to date, the Appeals Board finds claimant provided respondent with timely notice of accident as required by K.S.A. 44-520. That statute provides:

“Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer’s duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless”

The issue whether claimant gave notice to Mr. Grove is academic because based on the current record the Appeals Board finds just cause existed which extended the period for claimant to provide notice of accident to 75 days. That conclusion is based upon the finding that claimant was not aware he had sustained injury when he experienced back pain on or about August 22, 1996, as he had previously experienced similar pain which had resolved without consequence. It was not until his symptoms had progressed to include groin numbness that he realized he had injured himself. There was really nothing unusual regarding claimant’s condition until he began to experience the numbness in his groin which prompted his giving notice to Ms. Schreiber.

(2) Does K.S.A. 44-510f bar claimant’s entitlement to temporary total disability compensation?

Respondent and its insurance carrier contend K.S.A. 44-510f bars claimant from receiving additional disability benefits because claimant has received workers compensation benefits exceeding \$100,000 for earlier accidents involving other employers. The Appeals Board disagrees.

K.S.A. 44-510f provides as follows:

“(a) Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits **payable by an employer** shall not exceed the following:

“(1) For permanent total disability, including temporary total, temporary partial, permanent partial and temporary partial disability payments paid or due, \$125,000 for an injury or any aggravation thereof;

“(2) for temporary total disability, including any prior permanent total, permanent partial or temporary partial disability payments paid or due, \$100,000 for an injury or any aggravation thereof;

“(3) subject to the provisions of subsection (a)(4), for permanent or temporary partial disability, including any prior temporary total, permanent total, temporary partial, or permanent partial disability payments paid or due, \$100,000 for an injury or any aggravation thereof; and

“(4) for permanent partial disability, where functional impairment only is awarded, \$50,000 for an injury or aggravation thereof.” (Emphasis added.)

The Appeals Board finds the respondent's and its insurance carrier's reliance upon K.S.A. 44-510f is misplaced. K.S.A. 44-510f limits the amount an employer must pay for each separate and distinct accident. K.S.A. 44-510f does not operate to reduce the compensation payable due to a prior compensable injury but K.S.A. 44-510a does. However, a reduction in compensation under K.S.A. 44-510a is not applicable at this time because the statute specifically states that temporary total disability and medical benefits shall not be reduced.

WHEREFORE, the preliminary hearing Order dated May 16, 1997, should be, and hereby is, reversed and this case is remanded to the Administrative Law Judge with directions to address the remaining issues pertaining to claimant's entitlement to benefits.

IT IS SO ORDERED.

Dated this ____ day of July 1997.

BOARD MEMBER

c: Michael A. Doll, Dodge City, KS
Clifford K. Stubbs, Lenexa, KS
Kenneth S. Johnson, Administrative Law Judge
Philip S. Harness, Director